that act by implication forbids general exemptions from liability for negligence the contract was unenforceable in the United States, without regard to the *lex loci cantractus* or the agreement of the parties to be governed by it. The court, however, did not emphasize this point. This decision, therefore, seems to cover the whole field of foreign shipping contracts, with the result that unless the carrier brings himself within the narrow limits of section 3 of the Harter Act, which protects him in some respects, his common law liability for negligence cannot by any form of contract be limited, and exemptions to that effect will not be enforced in the Federal courts.

SPECIFIC PERFORMANCE, BY ENFORCING AN IMPLIED NEGATIVE COVENANT.—Shall a court of equity compel, by indirect means, the doing of an act, the positive performance of which it will not decree? The question has, it is said, been answered affirmatively in that class of cases of which *Lumley* v. *Wagner* (1852) 1 De G., M. & G. 604, is the leading case. There the defendant agreed to sing at the plaintiff's theatre for a certain length of time, also agreeing not to sing at any other place, without the permission of the plaintiff. Subsequently, the defendant broke her contract and agreed to sing at another theatre. The plaintiff prayed for an injunction, which was granted by Lord ST. LEONARDS, C., who rendered his decision on the ground that there was an express negative covenant, to which he could give effect. He says, at p. 622, " . . . I may at once declare, that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at her Majesty's Theatre, I should not have granted any injunction." Looking at this case alone, we find that although a court of equity can not decree specific performance of a contract for personal services, it will, where there is a negative covenant, reach the desired result by indirect means. The reason for applying here for equitable relief is the inadequacy of the remedy at law, because money damages could not be satisfactorily computed, nor give adequate compensation. Few decisions have given rise to so many misunderstandings and adverse criticisms as has this famous case. The court could not have compelled the plaintiff to employ the defendant and, there being no mutuality to the agreement, equitable relief should have been refused. *Clarke* v. *Price* (1819) 2 Wils. Ch. 157. The court compelled the defendant to remain idle and prevented her from earning a large salary.

To sustain *Lumley* v. *Wagner*, the Chancellor referred to the case of *Morris* v. *Colman*, 18 Ves. 436, decided by Lord ELDON, C., in 1812. But, as pointed out in the later case of *Clarke* v. *Price*, *supra*, Lord ELDON granted the injunction solely on the ground that he was giving effect to a partnership agreement, and he refused to grant an injunction in the *Clarke* case, because of want of mutuality. In *Kemble* v. *Kean* (1829) 6 Sim. 333, SHADWELL, V. C., had, on facts on all fours with those in *Lumley* v. *Wagner*, refused to grant an in-

junction. While this case was overruled by Lord ST. LEONARDS, it would seem to be correct in principle. *Montague* v. *Flockton*, L. R. 16 Eq. 189, was decided by MALINS, V. C., in 1873; here again was a contract for personal services, but lacking the negative covenant, which had been of the utmost importance in the decision of *Lumley* v. *Wagner*, *supra*. The Vice-Chancellor *implied* a negative covenant and granted an injunction, thus extending the rule laid down in the *Wagner* case. In the same year, Lord SELBORNE, L. C., in rendering the decision in *Wolverhampton & W. R. Co.*, v. *L. & N. W. R. Co.* (1873) L. R. 16 Eq. 433, said (at p. 440) after refering to the foregoing cases and the discussion there raised as to the effect of the presence or absence of an express negative term: "I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form." The case of *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 419, decided in the Court of Appeal, was thought to have put an end to this discussion. In that case, the court refused an injunction to restrain the defendant, who had agreed to serve the plaintiff company as manager for a term of years, from entering the service of another party. The court distinctly refused to imply a negative stipulation, thus limiting the doctrine of *Lumley* v. *Wagner*, *supra*, to cases where an express negative agreement should be found in the contract. On what grounds then, are we to explain the recent case of *Metropolitan Electric Supply Co.* v. *Ginder* [1901] 2 Ch. 799, decided by Mr. Justice BUCKLEY of the Chancery Division? One Ginder entered into a contract with the plaintiff in these terms: "The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years." At the end of three years the defendant refused to take any more electricity from the plaintiff and entered into a contract with a rival concern; whereupon the plaintiff asked for an injunction to restrain the defendant from dealing with any other company. The court interprets the contract as a negative one—namely, that while the defendant was not bound to take any electricity, he had agreed, that if he did take electricity, he would take it from no one save the plaintiff—and grants an injunction. At sight this would seem to be an attempt to return to the ruling of *Montague* v. *Flockton*, *supra*, but after a careful examination the decision is seen to be correct.

BUCKLEY, J., draws attention to the fact that this is not a contract for personal services, but one for the sale of goods, and it becomes necessary to determine whether the case is to be distinguished on this ground. In *Fothergill* v. *Rowland* (1873) L. R. 17 Eq. 132, the plaintiff tried to obtain an injunction to restrain the defendant from selling coal. The defendant had agreed to sell the entire output of his mine to the plaintiff for a period of five years, at an agreed rate, but, coal having risen in price, he broke his contract. Sir GEORGE JESSEL, M. R., sustained the defendant's demurrer on the ground that there was no cause for invoking the aid of a court

of equity, as adequate damages could be obtained at law. Ten years later a similar question was raised in the case of *Donell* v. *Bennett* (1883) L. R. 22 Ch. D. 835. In that case one of the defendants, Cormack, a fish curer, agreed to sell all fish refuse to the plaintiff and not to sell to any one else. In violation of his contract, he proceeded to sell to the other defendant, Bennett. FRY, L. J., granted an injunction on the ground that there was an express negative and that he was bound to follow the case of *Lumley* v. *Wagner*, *supra*. Aside from this, here was a case where money damages would have been inadequate, and as there was mutuality the contract could have been specifically enforced. Hence it will be seen that the fact that the contracts differ as to subject-matter is not a valid distinction.

In the principal case, we find that the remedy at law would be inadequate. The contract was to run for several years and there was no possible way of determining how much electrical energy the defendant would use. For, as said by BUCKLEY, J., the defendant might burn gas and use no electricity at all. This statement would seem to imply that there was want of mutuality. In the sense that the defendant could not be compelled to use the plaintiff's electricity, there was a want of mutuality. But the defendant alone may set up such a defence; and had he done so, in the principal case he would have been met by the answer that the court could and would compel the plaintiff to supply electricity, by a decree of specific performance if necessary. *Keith* v. *Nat. Telephone Co.* [1894] 2 Ch. 147; *Jones* v. *Parker* (1895) 163 Mass. 564. That being so, the case is to be sustained as falling within well-recognized doctrines of equity jurisdiction.

The decision may be criticized, however, in that it shows a dangerous tendency on the part of the English court, to revert to the doctrine of *Montague* v. *Flockton*, *supra*, without giving logical reasons for such action. This has been the case in New York. *Duff* v. *Russell* (1892) 133 N. Y. 678. On the other hand, for a correct interpretation of the English cases, see *Burney* v. *Ryle & Co.* (1893) 91 Ga. 701.

CONFLICTING EQUITABLE INTERESTS AND PURCHASE FOR VALUE.—Under what conditions an assignee or transferree of property is a *bona fide* purchaser and therefore protected against prior equities is a question that has caused great difference of opinion. The New York courts have held that unless value is given at the time and upon the faith of the transfer of the legal title itself, the purchaser takes subject to all prior equities. *Barnard* v. *Campbell* (1874) 58 N. Y. 73. On the other hand there are cases asserting that one who takes property in payment of any antecedent debt is a purchaser for value. *Taylor* v. *Blakelock* (C. A. 1886) 32 Ch. D. 560, 569.

In a recent case an improvement company which was building a railroad in the island of Jamaica under a concession from the